NO. 17-16693

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ETOPIA EVANS, *et al.*,

Plaintiff – Appellants,

v.

ARIZONA CARDINALS, *et al.*,

Defendants – Appellees.

Appeal from the Judgment of the United States District Court
for the Northern District of California
Case No. 3:16-cv-01030-WHA
(Honorable William H. Alsup)

PLAINTIFF-APPELLANT ETOPIA EVANS, *ET AL.'S* REPLY BRIEF

William Sinclair (CA Bar No. 222502)
SILVERMAN | THOMPSON | SLUTKIN | WHITE, LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432
bsinclair@mdattorney.com

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

While Defendants address a number of issues in their opposition brief, only two issues require further discussion here: the injury discovery rule and the availability of Plaintiffs' RICO conspiracy claim.

I. THE DISTRICT COURT MISCONSTRUED THE NINTH CIRCUIT'S INTERPRETATION OF THE INJURY DISCOVERY RULE.

Ninth Circuit precedent, including that relied on by Defendants, demonstrates that, the injury discovery rule applicable to RICO claims does not begin the statute of limitations period solely at the time the harm occurred. Rather, the period begins when a plaintiff knew or should have known of the facts giving rise to the claim. Combining that rule with the familiar Fed. R. Civ. P. 12(b)(6) standard that all factual allegations in a complaint must be taken as true, it was error for the District Court to dismiss Plaintiffs' RICO claims in light of their pleading that they did not know of Defendants' conduct, or their RICO injuries, until within the applicable four-year statutory period.

The fact patterns of the Ninth Circuit cases cited by both parties clarify when the RICO statute of limitations period begins. For example, in *Compton v. Ide*, plaintiffs brought an action against various municipalities, the United States, and various federal agencies to recover under civil rights statutes, RICO, and the Federal Tort Claims Act. 732 F.2d 1429 (1984) (*abrogated on other grounds*). The district court dismissed the complaint on limitations grounds and plaintiffs appealed,

arguing that even though they suffered injury in 1977, the limitations period was tolled until 1980 because of a continuing violation and because they did not discovery a related conspiracy until that time. *Id.* at 1432.

Discussing the issue within the context of plaintiffs' civil rights claims, a panel for the Ninth Circuit rejected that argument, stating that it "***is the wrongful act***, not the conspiracy, which is actionable in a civil case" and going on to note that "[w]hen a ***plaintiff has notice of wrongful conduct***, it is not necessary that he have knowledge of all the details or all of the persons involved in order for his cause of action to accrue." *Id.* at 1433 (emphasis added). Ultimately, the panel found that plaintiffs "had sufficient knowledge of their damages ***and of the actors involved*** in 1977 for their cause of action to have accrued at that time." *Id.* (emphasis added). Turning to plaintiffs' RICO claims, the panel relied on its "previous[] discuss[ion of the limitations issue within the civil rights claims context]" to conclude that they too were time barred for the same reasons.

In *Volk v. Davidson & Co.*, limited partners brought a fraud and RICO action against the sellers of interests in certain coal leases that were supposed to serve as tax shelters for the limited partners. 816 F.2d 1406 (1987). The district court dismissed those claims at summary judgment on limitations grounds and plaintiffs appealed. A panel of the Ninth Circuit concluded that in "a securities fraud case" such as that at issue, "the cognizable injury occurs at the time an investor enters …

a transaction as a result of material misrepresentations … even if an actual monetary loss is not sustained until later." *Id.* at 1412. However, "the statute of limitations is not triggered until the defrauded individual has actual or inquiry notice that a fraudulent misrepresentation has been made." *Id.*

Applying those standards to the instant case, the panel found that plaintiffs suffered a cognizable injury in 1976 and 1977 when they purchased the interests. However, the "statute of limitations did not commence to run until 1979 … because appellants were not placed on inquiry notice until their receipt of [a] 1978 annual report and the general partner's September 1979 letter" that notified plaintiffs, *inter alia*, that they likely had a claim against the entity from which they leased their interests based on misrepresentations it made. *Id.*

In *Beneficial Standard Life Ins. Co. v. Madariaga*, discussed in greater detail in Plaintiffs' opening brief, the district court found that the statute of limitations for plaintiffs' RICO claims began to run in July 1984 when one of the defendants was convicted of conduct underlying the RICO claim. 851 F.2d 271 (9th Cir. 1988). A panel of the Ninth Circuit reversed, finding that, as plaintiff had asked the defendant for his resignation in September 1980 after investigating him for alleged kickbacks, defendant was entitled to a trial on plaintiff's knowledge of defendant's bad acts.

In *Grimmett v. Brown*, an ex-wife and the trustee of her ex-husband's bankruptcy estate brought RICO claims against an attorney who allegedly

masterminded a fraudulent scheme to conceal the ex-husband's interest in a medical practice to defeat the ex-wife's community property interest. 75 F.3d 506 (1996). The district court granted defendants' motion to dismiss on limitations grounds and plaintiffs appealed. A panel of the Ninth Circuit affirmed, finding that plaintiffs had filed a complaint in the bankruptcy proceeding in May 1989 against the attorney in which they alleged the attorney "had conspired to cheat [the ex-wife] out of her share in [the ex-husband's] interests in the [medical] practice" and that "because of secret side agreements, [the ex-husband] continued to make as much money as he did before [and thus to the ex-wife], the reorganization [that took away her interest] amounted to a 'common plan to defraud [her].'" *Id.* at 509. In short, those allegations, which also formed the basis for the RICO claim at issue, established that the ex-wife had sufficient knowledge in May 1989 and thus her November 1994 RICO complaint was time-barred.

In *Pincay v. Andrews*, investors brought RICO claims against their former financial manager relating to excessive fees charged by the latter. 238 F.3d 1106 (2001). The district court allowed the matter to proceed to trial where they received a substantial jury award. Defendants thereafter filed a renewed motion for judgment and a motion for a new trial in which they argued, *inter alia*, that the statute of limitations had run on plaintiffs' claims. The district court denied those motions and defendants appealed.

A panel of the Ninth Circuit reversed, relying on *Beneficial Standard Life* for the proposition that a "plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which … ***would have led to discovery of the fraud***" and noting that as early as 1980, plaintiffs signed a document they received from defendants that stated in relevant part that defendants "will receive compensation from the" venture in an amount higher than plaintiffs claimed the parties had agreed to. *Id.* at 1110 (emphasis added). According to the panel, that document provided "'enough information to warrant an investigation' into whether the ventures in which they were investigating would result in more than" the amount plaintiffs claimed they should be paying defendants. Thus the statute of limitations on plaintiffs' RICO claims, which were filed in 1989, had long since run. *Id.*

In *Living Designs, Inc. v. E.I. DuPont de Nemours and Co.*, discussed in greater detail in Plaintiffs' opening brief, commercial nurserymen sued defendants for selling a contaminated herbicide that killed their crops. 431 F.3d 353, 365 (9th Cir. 2005). The case settled but plaintiffs later learned that defendants lied about certain test results, yielding a lower damages amount to plaintiffs in the settlement. In plaintiffs' subsequent RICO suit, the district court dismissed their claim on limitations ground but a panel of the Ninth Circuit reversed, finding those claims accrued not on the date the herbicide was used, the original case settled, or when

defendants were sanctioned by a judge in a related case, but rather when plaintiffs knew or should have known of the conduct at issue.

Finally, in *Crown Chevrolet v. General Motors, LLC*, the district court dismissed plaintiff's RICO claims on limitations grounds and a panel of the Ninth Circuit affirmed on the basis that plaintiff knew as of November 2008 that defendant had breached certain side agreements, thereby making plaintiff's February 2013 filing untimely. 637 Fed. Appx. 446 (9th Cir. Mar. 1, 2016).

In sum, the fact patterns from these cases (which all parties agree govern the issue) demonstrate that actual or constructive knowledge of a defendant's conduct triggers the RICO statute of limitations. Consistent with that principle, where, as here, Plaintiffs have alleged that they had no knowledge of the conduct – *i.e.*, the fraud – until March 2014, for purposes of a motion to dismiss, Defendants cannot succeed on their RICO limitations argument.

II. THE DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' STATE LAW CONSPIRACY CLAIM HAS NO EFFECT ON THIS APPEAL.

Defendants contend that the District Court dismissed Plaintiffs' RICO claims not only on limitations grounds but also, to the extent Plaintiffs asserted a RICO conspiracy claim, the same based on a failure to adequately plead facts that would support such a claim. And because Plaintiffs' opening brief addressed only the RICO limitations issue, Defendants argue that Plaintiffs waived their right to

challenge the District Court's supposed dismissal of their RICO conspiracy claim for failure to state a claim. Not so.

With regard to Plaintiffs' RICO conspiracy claim, the operative language of the District Court's Order states that "the amended complaint shows plaintiffs' RICO claim is barred by the statute of limitations. This order therefore does not reach additional arguments regarding the sufficiency of the pleading as to this claim, except that the amended complaint's failure to plead allegations showing a conspiracy is addressed below within the context of plaintiffs' conspiracy claim." Dkt. No. 168 at 10. The District Court then went on to address plaintiffs' state law conspiracy claim in a section entitled "State Law Claims" without mention of any case law addressing the sufficiency of pleading a RICO conspiracy claim (as opposed to a Maryland state law conspiracy claim), which as this Court has noted has its own set of requirements. *See Baumer v. Pachl*, 8 F.3d 1341, 1345 – 47 (9th Cir. 1993). Finally, in its "Conclusion," the District Court stated only that "[l]eave to amend the RICO claim is denied as futile because plaintiffs have already had ample opportunity to investigate ***and plead a timely claim under RICO***." Dkt. # 168 at 19 (emphasis added).

The context of the Order, coupled with the specific language at pages 10 and 19, makes clear that the District Court limited its analysis of Plaintiffs' RICO claims to limitations only and Plaintiffs thus have not waived their conspiracy claim. And

even if this Court were to disagree, it "may consider [an] issue [raised only in the reply brief] when the appellee has not been misled and the issue has been fully explored." *Greyhound Corp. v. Blakley*, 262 F.2d 401, 407 – 08 (9th Cir. 1958). Here, Defendants have not been misled. Plaintiffs' opening brief clearly indicated that Plaintiffs limited their appeal to their RICO claims and were not appealing the decision regarding their state law claims and nothing about that has changed. Moreover, while Plaintiffs stand by their position that the District Court did not reach the issue, if in fact it did, Plaintiffs are not trying to "play gotcha" with Defendants by raising this issue now; rather, they simply misread a portion of the District Court's Order that is hardly a model of clarity. And the issue can be fully explored. Defendants will have the opportunity at oral argument to address it and Plaintiffs consent to Defendants filing a sur-reply (of course if the Court permits) to address the issue in writing.

Finally, the issue is not complicated. If this Court finds that the District Court in fact decided that Plaintiffs failed to adequately state their RICO conspiracy claim, that decision was error in that the District Court failed to analyze the claim pursuant to federal case law identifying the appropriate standard by which to address it. *See, e.g.*, *Baumer*, 8 F.3d at 1345 – 47. As such, it should be, at a minimum, remanded for the proper analysis to occur.

In any event, the allegations of the amended complaint more than adequately stated a conspiracy claim. "To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." *Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d 915, 942 (N.D. Cal. 2013) (denying motion to dismiss RICO conspiracy claim). One who "adopt[s] the goal of furthering or facilitating the criminal endeavor" may be held liable as a "conspiracy defendant[.]" *Id.* "The illegal agreement need not be express as long as its existence can be inferred from the words, actions, or interdependence of activities and persons involved." *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 775 (9th Cir. 2002) (dismissed on other grounds). Direct evidence of a conspiracy, such as an admission by a defendant's representative that the defendant was a conspirator, "is seldom available." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1547 (9th Cir. 1989) (reversing summary judgment of conspiracy claim in favor of defendant). Thus, "[p]roof of agreement in RICO conspiracy cases 'can, and often is, based on inferences drawn from circumstantial evidence.'" *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 682 F. Supp. 1073, 1094 (C.D. Cal. 1987).

These inferences drawn from circumstantial evidence must be detailed enough to provide "plausible grounds to infer an agreement." *Bell Atl. Corp. v. Twombly*,

550 U.S. 544, 556 (2007). This must rise above "an allegation of parallel conduct and a bare assertion of conspiracy." *Id.* Allegations of circumstantial evidence and parallel conduct require "something more" in order to plausibly suggest an agreement, and they "must be placed in a context that raises a suggestion of a preceding agreement." *Id.* at 555, 557. Plaintiffs have met this standard, and a conspiratorial agreement can clearly be inferred.

For example, courts have assessed an assortment of "plus factors" that would "nudge the alleged conspiracy from conceivable to plausible." *See, e.g., B & R Supermarket, Inc. v. Visa, Inc.*, No. C 16-01150 WHA, 2016 U.S. Dist. LEXIS 136204, at *23 (N.D. Cal. Sep. 30, 2016). That case identified numerous instances of parallel conduct, along with "plus factors" that jelled the allegations into a cogent conspiracy allegation. *Id.* Those factors included "depart[ure] from the preexisting pattern elsewhere in the world," a "common motive to conspire as to [the complained-of] conduct" due to the consequences of acting alone, an "absence of competitive behavior," and an "opportunity to collude." *Id.* at *23-27. Applying these factors to the RICO allegations reveals the sufficiency of the allegations in the Amended Complaint.

To identify a "departure from preexisting patterns," one need look no further than the gross deviation in the standard of care provided by Club doctors and trainers, as compared to non-Club affiliated medical practitioners. Doctors nationwide

recognize that opiates should not be mixed with the operation of heavy machinery, or even driving vehicles, yet Club doctors provided opiates to players who were about to compete (or in the midst of competition) at the highest level of a violent sport, who were all-but-guaranteed to be hit by other elite athletes at dangerous levels of force. Dkt. # 136, ¶¶222-265. Medical doctors outside of the NFL would not support this. In fact, the NFL has, at points, recognized the painkiller crisis it created and the dangers associated with misuse of medications. *Id.* at ¶¶207-221. This includes recognition that Clubs distributed medications in manners that expressly departed from the standards imposed by federal law. *Id.* at ¶¶212, 219.

With regard to the "common motive to conspire," Plaintiffs pled a compelling theory that, taken as true, demonstrates that the NFL and its Clubs prioritized immediate return-to-play to improve the televised product at the expense of the health and safety of its players. *Id.* at ¶¶89-104. Forcing injured players onto the field and masking their injuries with medications would artificially inflate their performance and ultimately increase the profits of all Clubs, and thus all Clubs were incentivized to conspire and promote the alleged RICO conduct. *Id.* at ¶¶94-103. This also allowed Clubs to operate with smaller active rosters, thus reducing expenses for all clubs. *Id.* at ¶¶89-90. On the other hand, in the absence of such an agreement, if one Club unilaterally elected to pump its players full of medications to give them a short-term competitive advantage at the expense of the players' long-

term careers and health, the reaction would be immediate and visceral. Veteran players would note the discrepancy between this rogue Club's decisions and their former Clubs, and other Clubs would discover that the rogue Club was violating federal law and harming the health of players for a competitive advantage. Such scrutiny would result in serious consequences for the Club.

Defendants have argued that the widespread illegal and harmful distribution of medications is evidence that the teams were competing directly, rather than subverting competition and conspiring together. Though more typically at issue in antitrust cases, the principle rings true here; if the teams were as dedicated to pure competition as Defendants speciously argue, a home team would not have allowed other teams to illegally distribute controlled substances to away team players, since that would improve their opponent's ability to field a competitive roster and defeat them in that game. *See generally id.* The Clubs would also have a competitive incentive to report Clubs that violate federal law to ensure athletes prematurely return-to-play, especially given that Clubs have no reticence to report other conduct they deem improper. This is overwhelming evidence that the Clubs ***agreed*** to promote return-to-play over player safety.

As to the "opportunity to collude," Defendants' common attendance at conferences related to the alleged conduct, with evidence that representatives of the defendants were present, supported the plausibility of the allegations and counted as

one of several "plus factors" that warranted denial of the motion to dismiss in *B & R Supermarket*. *Id.* at *27-28. Here, Plaintiffs have identified numerous common meetings attended by team doctors and trainers (*see, e.g.*, Dkt. # 136, ¶¶83-88, along with the General Managers of the Clubs, the ultimate overseers and decision-makers responsible for the medical and training staff, *id.* at ¶116). They even used the identical drug tracking software (SportPharm) to further the scheme, at least until it was shut down, after the DEA and California Board of Pharmacy got wind of illegal conduct emanating from SportPharm and its sister company, RSF Pharmacy, out of the same location. *Id.*, ¶¶124, 291, 295, 315 – 17. The opportunity for collusion was clearly present and adequately pled.

In sum, Plaintiffs pled dozens of instances of Clubs engaging in unlawful – and harmful – distribution of medications to their players, spanning all 32 teams and decades of play, which supports the allegations that the Clubs conspired to distribute these medications unlawfully. These allegations are accompanied by a cogent explanation of the Clubs' motive and opportunity to conspire, along with abundant circumstantial evidence that the Clubs conspired to violate the RICO statute together.

CONCLUSION

In the District Court's Order dismissing Plaintiffs' RICO claims, the District Court acknowledged that "as discovery proceeds in this matter, [if] evidence

surfaces indicating the existence of a conspiracy, or indicating that some clubs lied to plaintiffs, then the Court will at least consider allowing plaintiffs to amend their complaint to re-add a conspiracy claim." Dkt. # 168 at 19. Indeed, such evidence did surface and much of it was included in Plaintiffs' Second Amended Complaint.[1] Accordingly, should this Court rule in Plaintiffs' favor on the statute of limitations issue, Plaintiffs intend to seek leave of the District Court to include the allegations of their Second Amended Complaint in support of their RICO conspiracy claim.

Dated: May 30, 2018 SILVERMAN THOMPSON SLUTKIN & WHITE, LLC

s/ William N. Sinclair
William N. Sinclair

Attorneys for Plaintiffs-Appellants

[1] Because Plaintiffs did not view the RICO conspiracy claim to be at issue, they did not include the Second Amended Complaint in their record excerpt. Plaintiffs will file a motion to supplement the record to add the same.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [X] this brief contains 3,301 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

Dated: May 30, 2018

Respectfully Submitted,

/s/

William N. Sinclair
Attorney for Plaintiffs – Appellants
201 N. Charles St., Suite 2600
Baltimore, Maryland 21201
bsinclair@mdattorney.com
(410) 385-9116

CERTIFICATE OF SERVICE

I am employed in the City of Baltimore, State of Maryland. I am over the age of 18 and not a party to the within action; my business address is 201 N. Charles St., Suite 2600, Baltimore, MD 21201 and my email address is dfarmer@mdattorney.com.

On May 30, 2018, I caused to be served the following documents described as:

Reply Brief for Plaintiffs-Appellants, *et al*.

on the following interested parties:

Gregg Levy
glevy@cov.com
Benjamin Block
bblock@cov.com
Sonya Winner
swinner@cov.com
Rebecca Jacobs
rjacobs@cov.com
Laura Wu
lwu@cov.com
Derek Ludwin
dludwin@cov.com

Allen Ruby
allen.ruby@skadden.com
Jack DiCanio
jdicanio@skadden.com

Daniel Nash
dnash@akingump.com
Stacey Eisenstein
seisenstein@akingump.com
Gregory W. Knopp
gknopp@akingump.com

Jodi Avergun
Jodi.Avergun@cwt.com

by:

_X_(BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM) In accordance with the electronic filing procedures of this Court, service has been effected on the aforesaid party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic services through the CM/ECF system.

_____(BY PERSONAL SERVICE)

_____(BY EMAIL) I am readily familiar with the firm's practice of email transmission; on this date, I caused the above-referenced document(s) to be transmitted by email and that the transmission was reported as complete and without error.

_____(BY MAIL) I am readily familiar with the firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; on this date, the above-referenced correspondence was placed for deposit at Baltimore, Maryland and placed for collection and mailing following ordinary business practices.

_____(BY FEDERAL EXPRESS) I am readily familiar with the firm's practice for the daily collection and processing of correspondence for deliveries with the Federal Express delivery service and the fact that the correspondence would be deposited with Federal Express that same day in the ordinary course of business; on this date, the above-referenced document was placed for deposit at Baltimore, Maryland and placed for collection and overnight delivery following ordinary business practices.

I declare under penalty of perjury under the laws of the State of Maryland that the above is true and correct.

Executed on May 30, 2018 at Baltimore, Maryland.

/s/
Desirena Farmer